

# LEGISLATIVE AUDIT DIVISION

Scott A. Seacat, Legislative Auditor  
John W. Northey, Legal Counsel



Deputy Legislative Auditors:  
Jim Pellegrini, Performance Audit  
Tori Hunthausen, IS Audit & Operations  
James Gillett, Financial-Compliance Audit

## MEMORANDUM

TO: Legislative Audit Committee Members

FROM: Jim Pellegrini, Deputy Legislative Auditor, Performance Audits

DATE: September 2003

RE: Follow-up Performance Audit:  
State Agency Land Exchanges (01P-05)  
Department of Natural Resources and Conservation  
Montana Department of Transportation  
Department of Fish, Wildlife and Parks  
Montana University System

### **INTRODUCTION**

We presented our performance audit of State Agency Land Exchanges to the Legislative Audit Committee in October 2001. The report contains two recommendations to the Department of Natural Resources and Conservation (DNRC) and two recommendations to the Montana Department of Transportation (MDT).

We requested and received information from DNRC personnel regarding progress toward implementation of our report recommendations regarding trust land exchanges: (1) use of cash equalization payments, and (2) implementation of land banking concepts. In addition, we tracked related legislation of the 2003 Legislature. DNRC implemented one recommendation and one recommendation was not implemented. We also requested and received information from MDT personnel regarding the implementation status of report recommendations directed at MDT operations: (3) clarifying procedures, and (4) documenting environmental decision-making. We reviewed the Right-of-Way policy manual and a recent MDT exchange file. Both recommendations to MDT were implemented. This memo provides a summary of the initial audit and our conclusion on the status of implementation of those recommendations.

### **INITIAL AUDIT SUMMARY**

The process of trading or swapping lands is referred to as an exchange. State land has been exchanged for private and/or other government-owned land for decades. Based on public comments relating to exchanges of state land, the Legislative Audit Committee requested a performance audit of the land exchange process.

The primary audit objective was to review land exchange procedures of several state agencies focusing on timeliness, establishing land value, compliance, comparison to other programs, and overall effectiveness. We selected DNRC, MDT, the Department of Fish, Wildlife and Parks (FWP), and the Montana University System (MUS) based on their significant land holdings, exchange activity, and constitutional and statutory provisions. The lands of these four entities make up approximately 99 percent of land owned by the state.

### **Background**

State land can be classified as either trust lands or fee (non-trust) lands. The Enabling Act granted sections 16 and 36 in every township within Montana to the state for support of common (public) schools. These lands are referred to as trust lands. Montana's Constitution gives direct management authority for trust lands to the Board of Land Commissioners. The Board delegates management authority to DNRC. In addition to trust lands, the state also holds fee title to lands (i.e., owns lands). Various state agencies manage fee lands including MDT, FWP, and MUS. Statutes and the Montana Constitution provide authority for management of fee lands.

The Enabling Act and the Montana Constitution specify, "Any public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area." The Constitution also specifies "No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state."

### **Audit Findings**

Based on our review of land exchange activities, we made four recommendations. The following summarizes our initial audit findings.

#### **Prior Audit Recommendation #1**

We recommend DNRC use cash equalization payments as an option in trust land exchanges.

#### **Prior Audit Recommendation #2**

We recommend DNRC establish procedures to implement land banking concepts as part of trust land management.

#### **Prior Audit Recommendation #3**

We recommend MDT clarify procedures used for state land exchanges, specifically those related to documenting land values.

#### **Prior Audit Recommendation #4**

We recommend MDT document its environmental decision-making process for land exchanges.

### **FOLLOW-UP AUDIT FINDINGS**

To determine the implementation status of our prior audit recommendations, we requested information from DNRC and MDT, reviewed documentation regarding our recommendations,

and tracked related legislation during the 2003 Legislature. The following table shows the implementation status of the recommendations made in the audit.

| <u>Recommendation Status</u> |          |
|------------------------------|----------|
| Implemented                  | 3        |
| Being Implemented            | 0        |
| Partially Implemented        | 0        |
| Not Implemented              | <u>1</u> |
| TOTAL                        | 4        |

Based on our follow-up review, it appears DNRC dedicated its resources toward implementation of Recommendation #2 and Recommendation #1 has not been implemented. MDT implemented the other two recommendations (#3 and #4). The following summarizes agency responses to our requests.

#### **Department of Natural Resources and Conservation Response**

##### **Recommendation #1**

Not Implemented. In its initial follow-up response, DNRC management indicated they had not implemented or taken any action toward implementation. The department had several questions regarding the recommendation and planned to investigate the matter further.

Subsequent to the 2003 legislative session, the department investigated use of cash equalization payments as an option for trust land exchanges. Based on its review, the department concluded the State cannot accept cash as a means of equalizing land values in an exchange involving trust lands.

##### **Recommendation #2**

Implemented. DNRC received approval from the Land Board in October 2002 to seek legislation to allow a land banking program. The department drafted legislation to submit to the 2003 Legislature.

#### **Montana Department of Transportation Response**

##### **Recommendation #3**

Being Implemented. MDT rewrote a portion of its Right-of-Way Manual to address land exchanges. Land exchange requirements were distributed to all field personnel during the 2001 annual Right-of-Way Conference. The department was in the process of developing explicit agreement clauses for land exchanges, making these available to personnel electronically, and updating the Manual with instructions on their use.

**Recommendation #4**

Implemented. An environmental evaluation is completed on every land exchange. The evaluation is reviewed and approved by the department's Environmental Services Bureau.

**Overall Follow-up Conclusion**

Our follow-up work indicates three of the four recommendations from the original audit have been implemented. Two of these recommendations (#1 and #2) were directed at DNRC operations. Based on DNRC's intent to seek legislation to address Recommendation #2, we decided to delay follow-up work to track legislation during the 2003 Legislature. House Bill 223, Laws of 2003, was introduced at the request of DNRC and the Land Board. The bill was enacted April 17, 2003 and authorizes a land banking process. As a result, Recommendation #2 is implemented. As mentioned previously, subsequent to the 2003 legislative session, the department investigated possibilities for implementation of Recommendation #1. According to the department, provisions within the Enabling Act and Montana's Constitution prohibit the state from accepting cash to equalize land values in trust land exchanges. Thus, while this recommendation has not been implemented, the department's legal interpretation indicates the recommendation cannot be implemented due to the aforementioned restrictions. According to Legislative Audit Division legal staff, the issue is whether the amount of cash accepted to equalize values is incidental or primary. If the amount is incidental, it could be argued that the action is still an exchange. However, what constitutes an incidental amount is not defined in the Enabling Act, Montana's Constitution, or statute. Thus, DNRC's literal interpretation is valid.

MDT has updated its Right-of-Way Manual to address land exchanges. Standard agreement clauses were written and are available for use by field personnel. Environmental evaluations are required for all exchanges. We reviewed a recent land exchange file and noted the use of standard agreement clauses and completion of an environmental evaluation. The evaluation was reviewed and approved by the Environmental Services Bureau. In addition, an email between MDT personnel indicated the need for proper documentation of land values. Based on our review, MDT has implemented both recommendations (#3 and #4) directed at its operations.